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No. 85

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE TRAILMOBILE COMPANY AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL WORKERS OF AMERICA, U. A. W.–C. I. O., LOCAL NO. 392, PETITIONERS

v.

LAWRENCE WHIRLS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW.

The opinion of the United States District Court for the Southern District of Ohio (R. 63–66) is reported at 64 F. Supp. 713. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 70–81) is reported at 154 F. 2d 866.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 5, 1946 (R. 70). The

petition for a writ of certiorari was filed on April 11, 1946, and was granted on June 10, 1946 (R. 81). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an employer who has restored a World War II veteran to the position occupied by him prior to his military service, and has not changed the incidents of his employment for one year, may thereafter deprive the veteran of his seniority rights and status, by collective bargaining agreement or otherwise.

STATUTE INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, as amended, 54 Stat. 885, 58 Stat. 798, 50 U. S. C. App. 301 *et seq.*, are set forth in the Appendix, *infra*, pp. 69–74.

STATEMENT

Respondent Lawrence Whirls entered the employment of the Highland Body Manufacturing Company in 1935 (R. 64). He entered the military service of the United States in 1942 (R. 64), and in May 1943 was honorably discharged therefrom and returned to his position as an employee of Highland (R. 64), without loss of seniority, and at the same pay and status (R. 4,

64). Highland and petitioner, The Trailmobile Company[1] were two related corporations manufacturing the same commodities in two separate plants in different parts of Cincinnati, Ohio (R. 63); Highland was a wholly-owned subsidiary of Trailmobile and had the same executive officers (R. 63).

After July 1940 the operations of the two companies were integrated. See *The Trailer Company of America*, 51 N. L. R. B. 1106, 1107, 1113. During the year 1943 a plan of consolidation of the two companies was executed whereby Trailmobile was to take over the assets and business of Highland and to assume, pay and carry out all of the latter's obligations (R. 2, 17–19, 63). Pursuant to this plan, Highland's supplies, equipment, and personnel were gradually transferred to Trailmobile's plant in the last months of 1943 (R. 2, 63), and the plan became fully effective on January 1, 1944 (R. 17–21), at which time Highland's employees, including respondent, were transferred to the Trailmobile payroll

[1] The Trailmobile Company was formerly called The Trailer Company of America (R. 61, 72), and some of the documents submitted to the District Court refer to the latter name. The record does not affirmatively show that the difference is one of name only, but all parties and the two lower courts have treated The Trailer Company of America and petitioner The Trailmobile Company as one and the same (R. 72). Trailmobile's brief in this Court (p. 4) states that the change in name occurred in 1944.

(R. 63). In its last full year of independent operation, 1942, Highland had roughly 100 employees and produced commodities worth one and one-half million dollars, and Trailmobile had 1,000 employees and its production was valued at twelve million dollars (R. 63).

For some years prior to the corporate consolidation, the employees of both companies were affiliated with the American Federation of Labor (R. 64), and a series of single collective bargaining agreements had been entered into with respect to the employees of both plants, including Whirls (R. 21–23, 39–40); see *The Trailer Company of America*, 51 N. L. R. B. 1106. After the operations of the two companies had been merged, a controversy arose between the two groups of employees as to their respective seniority rights. The former Highland employees insisted on continuing to compute their length of seniority from the date they began work for Highland, while the old Trailmobile workers wanted them to be treated as new employees of Trailmobile, with seniority counting only from January 1, 1944, the date of the consolidation. (R. 3, 64.) The controversy was submitted to the proper national representatives of the American Federation of Labor who decided that all employees of both companies should rate seniority under the consolidation as of the date they had been employed by their respective companies (R. 3, 6–7, 64).

The old Trailmobile employees thereupon reorganized as a unit of the Congress of Industrial Organizations, and in an election sponsored by the National Labor Relations Board, the new C. I. O. local, petitioner herein, was selected as the bargaining representative for most of Trailmobile's production and maintenance employees (R. 3, 6, 64; see *The Trailer Company of America*, 51 N. L. R. B. 1106, and 53 N. L. R. B. 1248).[2]

The company thereupon began collective bargaining with petitioner union (hereinafter called Local 392), and in July 1944, a contract was negotiated to take effect as of June 21, 1944,[3] which fixed the seniority rights of the former Highland employees, regardless of the time of their initial employment by Highland, as of January 1, 1944, the effective date of the merger (R. 3, 40–41, 64). The agreement further provided that within one year all of Trailmobile's employees were to join

[2] The Labor Board ruled that all the production and maintenance employees of Trailmobile (including Highland employees), with the exception of certain employees of the cab and woodworking departments, constituted a single appropriate bargaining unit. See 51 N. L. R. B. at 1113–1115; see also R. 3, 6, 23, 40–41. This ruling was made after the operating merger but before the corporate merger.

[3] The contract is referred to throughout the present record as that of June 21, 1944. R. 30, 41, 51; see also *Hess* v. *Trailer Co.*, 31 O. O. 566, 567. But there are indications that it was not actually signed until July 15, 1944. See Trailmobile Br. 5, n. 3; Local 392 Br. 2; cf. R. 57, par. VII.

petitioner union, thus effecting a closed shop (R. 64).[4]

Shortly after the negotiation of this contract, a class suit in an Ohio state court was brought by one Hess, a former Highland employee, on behalf of himself and other former Highland employees, including the respondent, seeking to enjoin both petitioners herein from carrying out the seniority provisions of the new agreement, insofar as it required the counting of the seniority of former Highland employees only from January 1, 1944 (R. 3, 28–35, 64). The basis of the claim was that under the National Labor Relations Act a collective bargaining agreement whereby the employees' agent bartered away the established rights of a minority of the employees for the benefit of the majority was invalid (R. 3, 64). Both the Court of Common Pleas for Hamilton County (R. 52–53; *Hess* v. *Trailer Co.*, 31 O. O. 566, decided December 19, 1944) and the Court of Appeals (R. 54–55) decided the case adversely to

[4] The District Court found that the collective bargaining agreement of July 1944 provided that within one year all the employees were to join petitioner union (R. 64). However, in its brief in this Court, Trailmobile indicates that the contract of July 1944 provided that the former Highland employees did not have to join petitioner union as a condition of employment (although all other employees had to do so), but that the next annual contract (signed in July 1945) did provide that all employees (including former Highland workers) had to join the C. I. O. union as a condition of employment (p. 5). The present record does not indicate which version is correct.

the former Highland employees, on the ground that it was not illegal for petitioners to treat the two companies as separate legal entities and, on the dissolution of Highland, its former employees as new employees of Trailmobile.[5] The Supreme Court of Ohio refused to review the case, sometime in the fall of 1945 (R. 16, 55). Respondent Whirls was not actually a party to this action, though he was working for Trailmobile at the time, and was doubtless aware of the institution of the suit (R. 6).

Complying with the closed shop provision of Trailmobile's contract with the union, Whirls joined the petitioner union in June 1945 (R. 65).[6] Aside from the official change in respondent's seniority status occasioned by the terms of the June 1944 contract, the company apparently took no action actually changing his position or pay until early in September 1945 when he was transferred from the Painting Department, where he had been drawing pay of $1.05 per hour, to the Stock Department, with a threatened reduction

[5] Neither the opinion of the Court of Common Pleas, its judgment entry (R. 52–53), nor the Court of Appeals' Decree and Entry of Affirmance (R. 54–55) purports to pass, in any way, upon a returned veteran's rights under the Selective Training and Service Act, and petitioners have not claimed that this point was presented to the state courts.

[6] See footnote 4, *supra*, p. 6. Trailmobile's brief in this Court states that respondent joined the union after the signing of the July 1945 contract requiring former Highland employees to join the union as a condition of employment (p. 5).

in pay to $.83 per hour, as well as a reduction in effective seniority (R. 57–58). Represented by the United States Attorney, pursuant to Section 8 (e) of the Selective Training and Service Act, respondent brought suit, on September 18, 1945, in the District Court against Trailmobile, alleging violation of the seniority status conferred upon him by the Selective Training and Service Act (R. 55–58). He prayed for an injunction against any reduction in pay below $1.05 per hour and against a change in his seniority status "to the control date of January 1, 1944," and for a mandatory injunction restoring him to his position in the Painting Department and to his seniority dating from his original employment on February 8, 1935 (R. 58). Local 392 was permitted to intervene; it filed an answer praying that the complaint be dismissed (R. 59). Trailmobile also answered, denying that respondent had a valid claim and praying for dismissal of his complaint (R. 60–63). It was urged that the state court litigation initiated by Hess raised the bar of *res judicata* against respondent, that respondent's seniority rights were protected by the federal statute for only one year, that Trailmobile had no statutory duties towards a Highland veteran-employee, and that by joining Local 392 respondent bound himself to abide by the agreements negotiated by the union.

The District Court tried the cause on the pleadings, oral stipulations of counsel, and documentary

exhibits (R. 74). The facts were almost wholly undisputed. It was brought out that, since the institution of the action, Whirls had been again transferred and was being paid $1.18 per hour (R. 8), and accordingly the parties agreed that the District Court's decision should be limited to the issue of seniority (R. 9). The District Court made findings of fact and concluded that respondent's cause of action was proved and petitioners' defenses invalid (R. 63–66). Judgment was entered December 20, 1945, directing Trailmobile to reinstate respondent's seniority as of February 8, 1935, and to cancel his present seniority status as of January 1, 1944 (R. 67). Both petitioners appealed (R. 67, 68).

The Circuit Court of Appeals for the Sixth Circuit affirmed, holding that the provisions of Section 8 (b) and (c) of the Selective Training and Service Act of 1940, which required that a veteran be restored to his former job without loss of seniority, precluded a collective bargaining agreement from whittling down the veteran's seniority, notwithstanding the fact that more than a year had passed after his return to the job (R. 75–76). It further held that the right of the respondent to his seniority continued to be protected by the Selective Training and Service Act, notwithstanding the consolidation of Highland and Trailmobile, because the latter assumed all the obligations of the former, and one of these obligations was to

continue the seniority status of Whirls (R. 78–79). Finally, the court rejected the contention that the class suit brought by Hess in the state courts of Ohio was *res judicata*. In that aspect of the case, it held that Hess was not in a position to bring a representative suit which would bind Whirls insofar as his reemployment and seniority rights under the Selective Training and Service Act were concerned (R. 79–80). Judgment of affirmance was entered on April 5, 1946 (R. 70).

Petitioners, in their petition for certiorari filed herein, have abandoned all the grounds urged before the lower courts, except the construction of Section 8 of the Selective Training and Service Act, as amended. In their petition and in their briefs on the merits, petitioners present only a single question, namely, whether Section 8 (b) and (c) of the Act gives to a war veteran, who was restored to the position of employment occupied by him prior to his military service and who was continuously so employed for more than one year, the right thereafter to retain the seniority status held by him when he entered the service, notwithstanding the fact that the plant union, which respondent was compelled to join in order to retain employment, had changed, by collective bargaining agreement, the seniority provisions of his employment contract to his detriment (Pet. 2). The case must thus be treated as if there were only one

company involved, and respondent had been employed by it since 1935.[7]

As we indicated in our Memorandum when the case was pending on petition for a writ of certiorari (p. 8), there is one set of additional circumstances, occurring since the filing of the petition in this Court, which we believe should be called to the Court's attention. We are advised that in a letter dated April 10, 1946, respondent was informed by Local 392 that he was charged with conduct unbecoming a union member, specifically with (1) instituting action in a civil court without exhausting the remedies provided by the union; (2)

[7] The petition for certiorari did not present as questions involved either the plea of *res judicata* or the circumstance that the two merged companies were originally separate entities; and the rulings of the court below on these points were not specified as error. Although Local 392's brief on the merits retains the "Questions Presented" and "Specification of Errors to be Urged" as those were each presented in the petition, Local 392 none the less attempts to argue these matters. We submit that this attempt is foreclosed both by the rules of this Court (Rule 38 (2); Rule 27 (6)) and by its consistent practice. *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242; *Webster Electric Co.* v. *Splitdorf Electrical Co.*, 264 U. S. 463, 464; *Gunning* v. *Cooley*, 281 U. S. 90, 98; *Connecticut Ry. & Lighting Co.* v. *Palmer*, 305 U. S. 493, 496–497; *Rorick* v. *Devon Syndicate*, 307 U. S. 299, 303; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 357; *Flournoy* v. *Wiener*, 321 U. S. 253, 259. Consequently, we do not argue these points.

Trailmobile agrees that the issue of *res judicata* is not presented here (Br. 17), and properly treats the case as though respondent had always been employed by one company.

violating the provisions of the contract negotiated between the union and the employers; (3) negotiating for himself through others than the union; and (4) in various manners acting and conducting himself in a way which is contrary and harmful to the interests of the union and its members. By letter dated April 15, 1946, Local 392 requested Trailmobile immediately to suspend respondent from work, as he was no longer a member of Local 392 pending his trial as to the charges preferred against him by members of the union. We understand that the company notified Whirls not to report for work and advised him that he would be paid for the rest of that week. We also understand, and Trailmobile admits (Br. 20), that the company has continued to keep Whirls on the payroll, on leave of absence with full pay. Trailmobile asserts that this condition will continue until the final determination of this case (Br. 20).

We do not believe that these circumstances make the case moot. Respondent appears to be still an employee of Trailmobile. He obtained a judgment below which gave him certain rights against that petitioner and conceivably against the union which intervened as a defendant and so became bound by the judgment. Being still an employee, respondent has rights under the decision below which he can presumably continue to assert.

SUMMARY OF ARGUMENT

In *Fishgold* v. *Sullivan Drydock & Repair Corp.*, No. 900, Oct. T. 1945, decided May 27, 1946, the Court held that each portion of the reemployment section of the Selective Training and Service Act must be given "as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." In that case, the Court held that the veteran's claim, based on the last clause of Section 8 (c), to a year's actual employment, even though his normal pre-service seniority did not entitle him to such steady work, could not be reconciled with the structure and terms of the Act. In the present case, the question concerns the protection accorded by the Act, after the initial year of reemployment, to the veteran's normal pre-service seniority. The court below correctly held that the Act could only be harmoniously and liberally construed by reading it to guarantee the veteran's pre-service seniority rights beyond the first year of reemployment.

I. A. The Act confers positive benefits; contrary to petitioners' contention, it is more than a measure designed only to prevent discrimination against the returning veteran because of his military service. In many clauses, as this Court recognized in the *Fishgold* case, the statute clearly gives the reemployed veteran protection

which he would not have had if he had remained at work. It is therefore no answer in the present case to urge that respondent is in no worse position than he would have occupied if he had never gone to war. It is clear from the detailed specification of positive rights in the statute that reintegration of the veteran with his fellow employees without discrimination was not the only purpose of Congress.

B. Congress provided for reinstatement in a continuing employment, not simply for a momentary restoration. The terms used in Section 8—"restore", "position", "in the employ of a private employer", "status", "seniority"—connote a continuing employment, and indicate that legislative concern extended beyond the veteran's initial day or week or year of reemployment.

C. The right to pre-service seniority was intended to last as long as the veteran remains in the company's employ; the only alternative is the untenable one that the right to restoration is subject, from the beginning, to the employer's whim. The one-year limitation, in Section 8 (c), in terms governs only "discharge" and cannot protect against detrimental changes in the veteran's employment during the first year which fall short of loss of position. Moreover, restriction of the veteran's protection to one year would nullify the avowed Congressional interest in seniority, insurance, and retirement benefits

and rights, all of which gain increasingly in significance with the passage of time; it would also permit unlimited discrimination against the veteran because of his military service. Congress cannot have so intended.

Nor is there substance to petitioners' argument that seniority rights cannot outlast the first year of employment because after that year the employer can discharge the veteran. The Act does not authorize the employer to discharge the veteran in order to evade the obligation to accord him his other rights. It is clear that Congress did not confer upon employers a power of discharge so unrestricted that it could destroy seniority rights of many years' standing.

D. This construction of the Act, under which the right to complete reinstatement without loss of seniority imposes a continuing obligation on the employer, does not freeze the veteran's job as to all incidents of employment; but it is unlikely that either technological advances or altered economic conditions will require changes in the case of seniority rights. Nor will such a construction involve burdensome litigation. In any event, Congress has squarely entrusted the courts with the protection of veterans' rights; it rejected a proposal for administrative handling of these problems.

E. Nothing in the National Labor Relations Act authorizes collective bargaining agreements

which purport to restrict the benefits conferred on veterans by the Selective Training and Service Act, any more than the National Labor Relations Act authorizes violations of other federal statutes dealing with specific industrial problems. Collective bargaining can no more whittle down a veteran's rights than can an employer's self-imposed personnel practices. And a veteran who joined a union solely to prevent dismissal under the terms of a closed-shop contract cannot be held to have voluntarily consented to the union agreement under which his own seniority rights were reduced.

II. The legislative history of Section 8 shows that Congress intended the veteran's restored seniority status to continue beyond the first year of reemployment. Throughout the Congressional consideration of the reemployment provisions, in committee and on the floor, the independence, substantiality, and stability of the right to restoration without loss of seniority was consistently asserted. The limitation of that right to the first year was never suggested; it was at all times treated as distinct and separate from the "one year" clause of Section 8 (c). And it is significant that in 1946, when the Selective Training and Service Act was last extended, the rights under Section 8 were made perpetual; if the right to restored pre-service seniority had been intended to continue only for the first year of

reemployment, a very much shorter extension would have sufficed.

III. There are no reasons, special to this case, why respondent should not be restored to his pre-service seniority. No claim is made that it would be either unreasonable or impossible to do so. Nor can the intense opposition of other employees be used to deprive him of his statutory rights, any more than strong and even inflamed public sentiment can deprive an individual of the right of free speech or the right to a fair trial. No improper or illegal discrimination against these other employees would result.

Respondent's enforced joining of petitioner union, in June 1945, in order to save his livelihood, cannot be deemed consent to the change in his seniority status; and the union's attempt to take disciplinary action against him because of his success in asserting his rights in the court below is, in the circumstances, of doubtful validity and of even more doubtful good faith.

ARGUMENT

At its last Term, the Court held, in *Fishgold v. Sullivan Drydock & Repair Corporation*, No. 970, Oct. T. 1945, decided May 27, 1946, that the Selective Training and Service Act does not guarantee a veteran the right to a year's actual employment (if the work he previously performed is still available), where his normal pre-service

seniority would not otherwise entitle him to such steady employment. The instant case involves the different issue of the protection accorded by the Act, after the lapse of the initial year of reemployment, to the veteran's normal pre-service seniority rights. Petitioners assert that the expiration of the first year marks the end of Congressional concern, in the Selective Training and Service Act, with all phases of the veteran's reemployment and rehabilitation in his job. Our position, on the other hand, is that Section 8 of the Act continues to give legislative sanction and protection to the veteran's restored seniority rights beyond the first year.

Section 8, as construed in the *Fishgold* case, provides that, unless the employer's circumstances have radically changed, a veteran must be "restored" to the "position * * * in the employ of a private employer" which he left to enter the service, or "to a position of like seniority, status, and pay"; that the restored position must be at least equal in pay, seniority and status to the pre-service job, and must also reflect seniority accumulated during the war but no step-up in priority; that insurance and other benefits must continue to be open to the reemployed veteran according "to established rules and practices relating to employees on furlough or leave of absence in effect with the employer" at the time the employee entered service; and, finally, that the

veteran cannot be discharged or demoted without cause for a year after his restoration, though he may be laid off during that year in accordance with the established pre-service seniority system.

The spirit in which these reemployment provisions of the Selective Training and Service Act are to be interpreted was announced in the *Fishgold* case (p. 7 of slip opinion):

> This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. See *Boone* v. *Lightner*, 319 U. S. 561, 575. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.

In accordance with these criteria, we propose to show that, in the light of its liberal purpose to aid the veteran, the Act can be harmoniously construed only by striking down the action which the employer and the union have here jointly taken to reduce drastically respondent's pre-service seniority. The crucial right here is that of restoration to a position with at least the same seniority as the pre-service job. That right, and the correlative obligation of the employer to

restore the veteran to such a position, are continuing ones, which the statute, properly and fairly construed, extends beyond the first year of reemployment.

I. SECTION 8 OF THE SELECTIVE TRAINING AND SERVICE ACT PROTECTS THE RESTORED VETERAN'S SENIORITY STATUS BEYOND THE FIRST YEAR OF REEMPLOYMENT

A. THE ACT CONFERS POSITIVE BENEFITS; IT IS MORE THAN A MEASURE DESIGNED ONLY TO PREVENT DISCRIMINATION AGAINST THE RETURNING VETERAN BECAUSE OF HIS MILITARY SERVICE

It will help at the outset in the clarification of the issues here involved to discuss an invalid proposition which threads petitioners' argument and which, if accepted, would dispose of the case in their favor. They urge that Section 8 has no other aim but to prevent discrimination against the veteran on account of his military service, and that therefore any change in employment conditions is permissible (apparently even at the time of initial restoration or during the first year) which would have occurred had the veteran remained at the plant.[8] The short answer to this proposal is that the Act shows on its face that it is not solely one to prevent discrimination against veterans on their return. As the Court said in *Fishgold's* case (p. 6 of slip opinion), "The Act

[8] Respondent does not claim that he was discriminated against because of his military service. Other former Highland employees, non-veterans, were treated in the same way.

was designed to protect the veteran *in several ways*. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. *He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind"*. [Italics added.][9]

In many of its clauses the statute clearly gives the reemployed veteran protection which he would not have had if he had remained at work. (1) The veteran is normally guaranteed, for instance, against receiving a job inferior to that which he had before entering the armed services, although had he stayed at the plant he might have been reduced in pay or status, and non-veteran colleagues may actually have suffered such reduction while he was away in service. (2) The veteran steps back on the seniority escalator at the point he would have occupied had he kept his position steadily during the war with uniformly accumulating seniority, even though [illegible] changes might have altered the accrual rate of his seniority rights. (3) He participates in insurance and other benefits "pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer *at the time such person was inducted into such forces*" (Section 8 (c)), although the rules might have been effectively changed during the

[9] All italics in this brief are added unless otherwise indicated.

war for employees then at work. (4) Finally, the veteran alone is guaranteed against dismissal or demotion without cause for one year.

It is no answer to the problem of the present case, therefore, to urge that Whirls is in no worse position than he would have occupied if he had never gone to war. He did go, and so he is in a different position; he has the right to benefits not conferred on those who did not assume the burden of their country's defense.

It is true, of course, that each of the specific benefits just enumerated was evidently designed, in part, to bar discrimination against the veteran as such; but it is also plain that Congress also had the different and more affirmative aim of enabling the discharged soldier to begin his commercial or industrial rehabilitation in at least as good a position as he had when he left to enter the armed forces.[10] Protection against discrimination, though important, was not enough. The veteran was to have the fixed and accustomed starting point of his old job from which to begin his economic readjustment in civilian life. Section 8 would not have been drafted as it is, with detailed specification of these positive rights, if

[10] In the debate on the Selective Training and Service Act, Representative Healey stated that "You have held out to these men you are going to induct into service that you will restore them insofar as you have the power to restore them to their status quo before they were inducted into the service." 86 Cong. Rec. 11703. Uniform Congressional comment was to the same effect. See *infra*, pp. 56–58.

the legislative intention had been merely to ensure that the veteran would not be penalized by employer or union on account of his military service. It would and could have been cast in the familiar terms of a general prohibition against such discrimination. We point out below, pp. 47, 53, that Congress rejected a proposal which would have made failure to reemploy a veteran an unfair labor practice. Consequently, to read the statute as petitioners urge, as embodying only a rule against discrimination, is to find in it provisions which Congress advisedly refused to write, while at the same time remaining oblivious to the statute's actual intention, structure, and terms.

Contrary to petitioners' assumptions, the *Fishgold* case did not imply otherwise. The Court there recognized that the affirmative requirement of restoration to the veteran's old job embodied the dual purpose of the Act to bar discrimination against him and, at the same time, to give him a definite measure of economic security. Petitioners isolate one or two sentences in the opinion from their context,[11] and conclude from them that the Court has already determined that Section 8

[11] "But we would distort the language of these [seniority] provisions if we read it as granting the veteran an increase in seniority *over what he would have had if he had never entered the armed services.*" "It [Congress] sought to preserve the veteran's rights under those [seniority] systems and to protect him against loss under them *by reason of his absence.*" (Slip opinion, pp. 7, 9.)

is nothing more than an injunction to employers not to penalize veterans because of their military careers. But the Court was obviously concerned with the case then before it—a demand for a status superior to pre-service seniority—and not with the instant problem of preservation of pre-service seniority, nor with that which would arise if an unanticipated but non-discriminatory reduction in seniority had occurred while the veteran was away. This is made clear by the body of the opinion and the reiterated emphasis on restoration to the old job plus cumulated seniority. Particularly apt is the sentence immediately succeeding that first quoted in footnote 11, in which the Court agreed that "by these [seniority] provisions Congress made the restoration as nearly a complete substitute for the original job as was possible." Conversely, the Court did not agree that the only purpose of Congress was to reintegrate the veteran with his fellow employees without discrimination.

B. CONGRESS PROVIDED FOR REINSTATEMENT IN A CONTINUING EMPLOYMENT, NOT SIMPLY FOR MOMENTARY RESTORATION

With petitioners' inaccurate conception of Section 8's motivating aim put aside, it is not difficult to draw from the words of the statute the type and duration of the mutual rights and obligations Congress meant to establish.

The clauses here pertinent provide (Section 8 (b)) that on the return of the inducted person

with a certificate of service, who is still qualified to perform the duties of the position and who makes application for reemployment within the time required by law,

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position

without cause within one year after such restoration.

Restoration to a *position in the employ* of the employer necessarily implies a continuing relationship between employer and employee, and cannot be merely a single one-time obligation which is entirely fulfilled when the employer places the veteran's name on his rolls, or the first time the veteran comes to work. Each of the critical words employed by Congress—"restore", "position", "in the employ of a private employer", "status", "seniority"—connotes a continuing employment of indefinite duration. To "restore", according to the Oxford English Dictionary, is "to reinstate or replace (a person) in a former office, dignity, or estate", or "to bring back (a person or thing) *to* a previous, original, or normal condition."[12] A "position" is, in general, an "official situation, place, or employment", and, as the *Fishgold* case expressly recognizes, in the industrial field a "position in the employ of a private employer" involves a continuing employer-employee relationship—surviving lay-offs, furloughs, and leaves of absence—

[12] Other pertinent definitions of the term, in the Oxford English Dictionary, are: "To bring back to the original state; to improve, repair, or retouch (a thing), so as to bring it back to its original condition"; "To renew; to set up or bring into existence again; to re-establish, bring back into use, etc."; "To grant to or obtain for (a person) reinstatement *to* former rank, office, or possessions." [Italics in original.]

to which is attached a group of mutual rights and obligations varying with the terms of the employment. Similarly, the very heart of "status" is continuity of a definitive condition; and "seniority" rights are most frequently of significance only at discontinuous times in the course of a continuing employment, such as periods of slackened work, rearrangement of shifts, or the occurrence of vacancies in more desirable positions. The same is true of insurance, sick, and retirement benefits which Section 8 (c) specifically preserves for the reemployed veteran.

These terms and provisions of Section 8 strongly imply that Congress intended to provide for the reinstatement of the veteran in a continuing employment and did not limit its concern to the initial replacing of the veteran on his former employer's rolls, leaving him thereafter to protect his job, and its incidents, by his own or his union's force. And these words of Section 8 accurately reflect the legislative interest in the veteran's continuing employment, as shown by the uniform Congressional pronouncements made in the course of the adoption of the Section. See *infra*, pp. 54–58.

C. THE RIGHT TO PRE-SERVICE SENIORITY IS NOT LIMITED TO SIMPLY THE FIRST YEAR OF REEMPLOYMENT

It is a corollary of the *employer's continuing obligation to restore the veteran to his old position* (or a like one), that he is normally bound, so long

as the Act remains in effect,[13] and the veteran is in his employ, not to effect any unconsented detrimental change in the incidents of his reinstated employee's position, as they were at the time of reemployment. In the absence of changed circumstances or the veteran's consent, his pay cannot be lowered, his seniority decreased, his benefits cut off, or his status diminished.[14] Otherwise, the right to *restoration* is deprived of its full meaning and the veteran's right to be "protected against receiving a job inferior to that which he had before entering the armed services" (*Fishgold* v. *Sullivan Drydock & Repair Corp., supra,* slip opinion, p. 6) becomes an entirely insubstantial privilege. But Congress, intent upon rehabilitating the veteran in his old job, was certainly not ready to allow the employer drastically to reduce at will the veteran's pay or seniority or status of benefits, perhaps within a day or a week after he had returned to work. The veteran's rights to restoration without loss of seniority was intended to

[13] Public Law 473, 79th Cong., 2nd sess., approved June 29, 1946, amended Section 16 (b) of the Selective Training and Service Act, as previously amended, to provide that all of Section 8 should have indefinite existence, and thus survive the terminal date of the other portions of the Act. Previously, only Paragraph (g) of Section 8, pertaining to the Personnel Division of the Selective Service System, was excluded from lapse at the termination of the Act. See *infra*, pp. 59–60, 72–73.

[14] See *infra*, pp. 36, 44–45, as to the possibility of distinguishing the duration of rights to seniority and insurance benefits from those to restored pay.

be more secure than a shadow right.[15] And since the statute imposes no time limit on existence of the right, it must have been intended to last as long as the veteran remains in the company's employ. The only alternative is the untenable one that the right to restoration is without substance and the veteran subject, from the beginning, to the employer's unfettered will.

Trailmobile recognizes the futility of urging that the veteran's position is totally at the mercy of the employer from the day of reinstatement. It admits that the statutory protection must have some duration; but it insists that the guarantee lasts for only one year since it finds effective sanction solely in the "one year" clause of Section 8 (*c*). Petitioner flatly asserts that "paragraph B [of Section 8 (b)][16] does not guarantee any length of time for seniority, status, or pay," and "in other words, under the terms of this particular paragraph, after the employee has been restored to *such position* or to a *position of like seniority, status, and pay*, there is no statutory prohibition against the employer doing with such

[15] Senator Thomas described Section 8 as an attempt to "make secure [the veterans'] seniority, and to make secure all of the relations they had gained as a result of working." 86 Cong. Rec. 10572. See *infra*, pp. 56–58.

[16] "(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;"

employee as circumstances then might require. His status could be changed, his pay could be changed, and so could his seniority without any violation of this paragraph (b) (B). Without resorting to the last provision of (c),[17] there would be no guarantee of *seniority* nor *status* nor *pay* for any length of time * * *." (Br. 10–11; italics in original.) This attempt first to destroy Section 8 (b) (B), and then to resurrect it by way of an unrelated portion of Section 8 (c), is the only way petitioner can escape its dilemma of either leaving the veteran wholly unprotected against unfavorable changes even during his first year, or of admitting that the right to pre-service seniority continues indefinitely. Petitioner cannot succeed, however. Paragraph (b) has a greater function, and paragraph (c) a lesser one, than petitioner ascribes. In Point II, *infra*, pp. 50–60, we shall show that Congress, in the course of enacting the statute, treated the right to resto-

[17] "(c) Any person who is restored to a position in accordance with the provision of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

ration without loss of seniority as entirely distinct from the "one year" clause and as independently substantial. Here, we point out that, on analysis of the terms and content of Section 8, the dilemma can only be resolved by recognizing that the right to restored seniority continues indefinitely.

1. Grammatically, there can be no doubt but that "within one year" applies only to the last clause of paragraph (c), and does not relate to the other rights granted by paragraph (b) and (c). Each of the clauses of paragraph (c) is set off by commas, and the limiting phrase appears only in the last clause. In its recent enumeration of veterans' reemployment rights in the *Fishgold* case, the Court referred to the one year provision only in connection with the guarantee against discharge without cause, and all parties in that case (including the Congress of Industrial Organizations and the United Automobile, Aircraft, Agricultural Implement Workers of America, parent bodies of the union petitioner herein, appearing as *amici curiae*) expressly recognized that to be so.

2. However, we do not understand petitioners as claiming that Section 8 (c) can be directly interpreted, as a matter of grammar, to impose a one-year limitation on other reemployment rights, but only that these other rights are in themselves entirely ineffectual after initial res-

toration, that they have only a momentary existence, and that all of a veteran's real rights must stem from the "discharge" provision. But that clause cannot carry this burden since it relates only to "discharge", which "normally means termination of the employment relationship or loss of a position" (*Fishgold* case, p. 8 of slip opinion), and obviously cannot protect the veteran, even during his first year, against unwarranted changes in his employment status, which fall short of loss of his position. It is true that, as interpreted in the *Fishgold* case, discharge "from such position" is broad enough to cover "demotions". But there are many substantial detrimental changes in employment which cannot be characterized as "demotions". Reductions in pay, for instance, are often not classifiable as demotions, especially in companies without a well developed and rigid job structure. Changes in seniority status, such as that imposed on Whirls, may not constitute a loss of an old position and acquisition of an inferior one. The last clause of Section 8 (c) certainly affords no protection against such intermediate changes, and, on petitioners' theory, the veteran would be left without statutory guarantee from the first day of his reinstatement. Congress cannot have intended to leave such large portions of the returning vet-

eran's status subject to immediate and drastic change.[18]

3. Moreover, the argument that Section 8 (b) B) and the first part of Section 8 (c) have no real vitality of their own, but that effective protection lies only in the last provision of paragraph (c), cannot be harmonized with the terms Congress used or the nature of the rights it sought to protect.

a. First, as we have shown above (*supra*, pp. 26–27), "restore", "position in the employ of a private employer", "seniority", and "status", are all words connoting a continuing employment, and would have had no place if Congress had been interested, in that portion of the Act, only in bringing the veteran and his former employer together initially. Yet paragraph (b) and most of paragraph (c) have no other function in petitioner's interpretation of Section 8, since, in its scheme, it is only the "one year" clause which governs the veteran's continuing employment.

b. Secondly, cutting off the veteran's rights at the end of his first civilian year would nullify the protection Congress was careful to give to sen-

[18] In the *Fishgold* case, the Court explicitly recognized that the guarantee against demotion or termination does not encompass all the protection actually afforded to the veteran, when it said (slip opinion, p. 9) that what Congress undertook to do was to give the veteran protection within the framework of the seniority system *plus* a guarantee against demotion or termination of the employment relationship without cause for a year."

iority, insurance, and retirement benefits and rights, all of which normally grow in significance with the passage of time. Retirement rights, in particular, become of value only after many years of employment, and seniority and insurance rights progressively attain greater importance. There would be little point in taking pains to guarantee the veteran's reinstatement in such rights, if the guarantee were not to last long enough to be effective. Section 8 itself bears explicit witness to Congressional concern with securing these increasingly substantial rights. Paragraph (c) provides that the returned veteran "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence *in effect with the employer at the time such person was inducted into such forces.*" It is difficult to believe that Congress could, on the one hand, be careful to provide that the veteran was entitled to these benefits *according to the rules* in effect *when he entered the service* (forestalling any attempt by the employer to deprive him of these benefits by changing the pre-existing rules during the veteran's military service), and on the other, have desired to remove all statutory protection at the end of one year, thus permitting the employer then to reduce the veteran's benefits by any change in rules that he desired. Rather, it is probable that

Congress intended the reinstated veteran to be secure in these benefits without limitation of time. And there is no ground for reading into the statute a distinction, as to duration of protection, between (i) seniority rights, and (ii) insurance and retirement benefits. Paragraph (c) expressly requires the veteran to be "so restored without loss of seniority"; those references to seniority were deliberately inserted to insure the retention of these significant rights by railroad and other employees. See statement of Representative May, 86 Cong. Rec. 11702, quoted in the *Fishgold* case, p. 10 of slip opinion; see also *infra*, pp. 54–58. Nevertheless, petitioners would have it that Congress was content to single out these rights for protection during a period when they would be relatively unimportant to the veteran and to withdraw its guarantee just as seniority privileges were gaining increasingly in significance.

In our view, the only proper construction is that the Act does not differentiate, as to duration of the employer's obligation, between pay, status, and seniority. As we point out below (*infra*, pp. 44–45), necessary alterations in employment conditions which are actually justified by changed circumstances are authorized within the framework of the Act, and the proper adjustment of the employer's industrial relations, through the years, need not be much troubled. Trailmobile, however, cannot conceive that the veteran's re-

stored pay and status were intended to be protected against diminution, and argues that seniority cannot be treated any more favorably (Br. 10, 15–16). We may point out, however, that it is entirely possible to interpret Section 8 as placing seniority on a different plane from pay or status. Unlike those incidents of employment, time is of the essence of seniority, and seniority rights normally grow in importance with length of service. Moreover, seniority rights, being relatively stable, ordinarily do not fluctuate with industrial conditions as wages do, nor is there usually much need for change. It would be entirely reasonable, therefore, to protect seniority (as well as retirement and insurance rights) over a longer period than pay. And there is substantial warrant, in Section 8, for believing that Congress intended such a distinction. Paragraph (c) contains no reference to pay or status, but it does single out "seniority" and "insurance or other benefits". There is an express direction that the veteran is to be "so restored *without loss of seniority*", and we need not repeat that Congress was especially intent upon protecting seniority rights. See *infra*, pp. 54–58.

Petitioners contend, however, that Whirls' seniority "is not an inherent right of employment" but is solely derived from the various expired A. F. of L. union contracts under which he worked

before entering service, or under the 1944 and 1945 agreements between the C. I. O. union and the company. The argument seems to be that, whatever may be a veteran's rights under other company seniority systems, the respondent here has no claim to continued seniority dating from 1935, since the A. F. of L. contracts are no longer in existence, and the C. I. O. agreement counts his seniority from January 1, 1944. But the Act evidently requires the reinstatement of the veteran to his pre-service seniority, if a seniority system then existed in the plant by union agreement or employer practice, regardless of expiration of the particular union contract governing seniority at the time the veteran entered service, or unfavorable change in the seniority rules during the employee's military service, unless it would be unreasonable or impossible for the employer so to restore the veteran. The Act does not create its own seniority system, but it does accord statutory sanction to systems existing at the time the veteran joined the forces. Cf. R. 77; *Elder* v. *New York Cent. R. R. Co.*, 152 F. 2d 361, 364 (C. C. A. 6). Petitioners' contrary contention would drain Section 8's careful protection of seniority rights of all meaning, since the employer would be required to restore the veteran's seniority only where he would be otherwise impelled to do so, either by a currently subsisting union contract or his own current seniority rules.

c. Furthermore, restricting the veteran's rights to his first year of reemployment would have the direct consequence of thereafter permitting the employer, or the union, to discriminate against the veteran because of his military service, or to withdraw the accumulated seniority and other rights conserved during the preceding year. Nothing would prevent the employer, for instance, from saying in effect to his veteran employee: "During your first year back at work I was forced to count your years of military service toward seniority, but now I am no longer required to do so, and, since you did not gain any experience useful to me while you were in the Army, you are hereby reduced in seniority to your level at the time you entered service, and no more." Indeed, the employer would be free to discharge all veterans simply because they were veterans. It is entirely unlikely that Congress intended to authorize such discrimination against "those who have been obliged to drop their own affairs to take up the burdens of the nation" (*Boone* v. *Lightner*, 319 U. S. 561, 575). Nor can this consequence be avoided by holding that a veteran's "right against discrimination as such", and nothing else, survives the first year. The terms of the statute simply do not permit such a construction. As we have pointed out, *supra*, pp. 20–24, its purpose extended beyond protecting the returned soldier against being penalized because of his

military career. Section 8 is framed, not in terms of broadly preventing discrimination against veterans (cf. National Labor Relations Act, 49 Stat. 449, Sec. 8; 29 U. S. C. 158),[19] but so as affirmatively to grant a series of specific positive rights. There is no general guarantee against discrimination which can survive once the specific rights have lapsed, and the Act does not envisage partial

[19] "SEC. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, * * * or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

"(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)."

survival of these specific rights. It would require rewriting the Act to provide that the veteran's definite right to his pre-service seniority (plus accumulated time) ends for most purposes with his first year, but somehow continues in existence to protect him against a reduction grounded on discrimination against him as a veteran.

4. Petitioners imply that no rights can outlast the first year of reemployment because then the employer must be presumed to have unlimited power of dismissal, and the "whole (employment) is greater than any of its parts (seniority)" (Brief of Local 392, p. 11).

But there is a flaw in the major premise of that contention: nothing in Section 8 authorizes the employer to discharge the veteran in order to evade the obligation to accord the veteran the right which that Section grants him. Paragraph (c) does forbid discharge without cause for one year, but there is nothing in the section which expressly permits unlimited discharge thereafter, and the "one year" clause does not necessarily imply full power in the employer, at the end of the year, to dismiss the veteran without reasonable cause. A number of varying gradations in the scope of the employer's power to dismiss, after the first year, are logically open to inference. Since the statute is not express upon the point, the extent of the employer's powers must be gathered from the intent of the whole section,

with due concern for paragraph (b) (B) and the first clauses of paragraph (c), as well as for the "one year" provision. In this view, the preferred interpretation would be to recognize the employer's right, after the initial year, to discharge for any cause, except where the dismissal forms part of an attempt to evade the specific requirements of paragraph (c) or to coerce the employee to abandon those rights. Without such a restriction on the power of dismissal, there would be little significant protection for the seniority, retirement, insurance, and sick benefit rights which Congress certainly desired to secure (*supra*, pp. 33–36; *infra*, pp. 52–59), nor would the veteran be guaranteed, as he was undoubtedly meant to be, against regressive discrimination stemming from his military service (*supra*, pp. 38–40). But it is just such discrimination which the petitioner union threatens. Local 392 says (Br. 13):

> The effect of the lower Court's decision is to place the Union in a position where it must do one of two things, (a) either discriminate against the Trailmobile veterans and allow the Highland veterans to supersede them on the seniority list, or (b) in fairness to the Trailmobile veterans, negotiate for the discharge of Highland veterans at the end of one year's guaranteed employment. By this strained construction placed on the Act of Congress,

the Courts are turning a veteran's benefit into an absolute detriment.

It is not clear why alternative (a) involves any discrimination, inasmuch as advancement on the seniority list would not depend on prior application, but actual seniority; a Highland veteran with seniority from 1941 would still be junior to a Trailmobile veteran with seniority from 1940. As for alternative (b), that is a scarcely veiled threat to secure respondent's dismissal in the event that the judgment below is affirmed. The very suggestion of such a course of action seems to us proof positive that Congress did not intend to confer upon employers a power to discharge so unrestricted that it could destroy seniority rights of many years' standing.

We point out below, pp. 54–56, in more detail, that the protection for seniority rights was originally embodied in the Act by reason of the situation in the railway industry. There, as is well known, most employment is based on seniority. Seniority rights of railroad employees have accordingly been held to be a species of property, and they have been protected in both state and federal courts. *Nord* v. *Griffin*, 86 F. 2d 481 (C. C. A. 7), certiorari denied, 300 U. S. 673; *Griffin* v. *Chicago Union Station Co.*, 13 F. Supp. 722 (N. D. Ill.); cf. *Estes* v. *Union Terminal Co.*, 89 F. 2d 768 (C. C. A. 5); *Gregg* v. *Starks*, 188 Ky. 834; see Comment (1937) 47 Yale L. J. 73.

Certainly Congress could not have intended that, where a railroad employee with seniority from, say, 1926, returned from war service in 1945, the union and the railroad acting jointly could demote him after 1946 to seniority from 1940—and, if he thereafter complained or succeeded in enforcing his rights by injunction, be free to discharge him altogether.

We believe that harmonious construction of the reemployment provisions as a whole necessarily requires (1) that the employer does not have full freedom to discharge after one year where such discharge is designed to deprive the veteran of other rights accorded him under the Act, and (2) that the employer's broad but not unlimited power of discharge after the first year does not limit to one year the duration of the veteran's seniority rights.

In summary, close analysis of the terms of paragraphs (b) (B) and (c) indicates that the "one year" clause does not govern the veteran's rights incident to restoration in his old position with full pre-service seniority, but rather that this right to complete reinstatement without loss of seniority imposes a continuing obligation on the employer, enduring beyond the first year of reemployment.

D. THIS CONSTRUCTION OF THE ACT DOES NOT FREEZE THE VETERAN'S JOB AS TO ALL INCIDENTS OF EMPLOYMENT, NOR DOES IT THREATEN BURDENSOME LITIGATION

Read as we suggest its terms require, Section 8 places no time limit on the existence of the employer's obligation to maintain the returned servicemen's seniority status. Protection against unfavorable changes in employment conditions is afforded indefinitely.[20] This is not to say, however, that the veteran's job is absolutely frozen forever, in all its incidents. The statute assumes change, as new circumstances actually require, though not at the whim of the employer or of a hostile union. Section 8 (b) (B) makes it clear that when the employer's circumstances have so changed as to make it impossible or unreasonable to maintain the veteran in his old position, the statutory obligation does not bar the necessary alterations in the conditions of employment. This authorization for change is sufficiently broad to permit necessary adjustments without allowing the employer's mere convenience to deprive the veteran of his rights. *Kay* v. *General Cable Corp.*, 144 F. 2d 653 (C. C. A. 3); *Hall* v. *Union Light, Heat & Power Co.*, 53 F. Supp. 817 (E. D. Ky.). Necessary reductions in force caused by changed production requirements or altered economic condi-

[20] The Canadian Reinstatement in Civil Employment Act 1942, 6 Geo. VI, c. 31, forbids discharge of the reinstated veteran without reasonable cause, and places no time limit in this obligation, though the burden of proof as to "cause" shifts from employer to employee after six months.

tions can be made. Technological advances will warrant certain shifts in personnel requirements, and similar substantive changes in industrial techniques and practices may make it unreasonable to maintain a veteran in status quo. In the case of seniority rights, it is unlikely that many changes will normally be required. Secondly, a veteran's job, like that of any employee, can always be changed for proper "cause", just as a veteran can always be dismissed for cause. Thirdly, the veteran can voluntarily consent to a detrimental change in his employment status.[21] We suggest, though the point is outside the instant case, that it may be proper to consider a veteran's *voluntary* acceptance of union membership, and designation of the union as his collective bargaining agent, as consent to all changes in his status resulting from

[21] The factors moving the Court, in *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, to outlaw waivers by employees of liquidated damages for failure to pay statutory minimum wages, and in *D. A. Schulte, Inc.* v. *Gangi*, No. 517, Oct. T. 1945, decided April 29, 1946, similarly to outlaw compromises, are not present here. Unlike the Fair Labor Standards Act, it violates no legislative policy of the Selective Training and Service Act to permit voluntary adjustments by employer and employee of their mutual rights and obligations. The Selective Service System's Handbook on its Veteran's Assistance Program states:

"Sec. 301.5 (a). A veteran, if he so desires, may waive his reemployment rights. Such a waiver, however, must be proved by clear and positive evidence and if induced by fraud, misrepresentation, or by coercive methods, threats, or force is invalid. The person claiming the waiver has the burden of proving its validity."

collective bargaining by the union with the employer. Cf. *Elgin, Joliet & Eastern Railway Co.* v. *Burley*, 325 U. S. 711; on rehearing, No. 160, Oct. T. 1944, decided March 25, 1946. This is not our case, since Whirls joined Local 392 only in order to keep his job with Trailmobile, and joined it after it had made the contract which reduced his seniority; in the face of this economic duress, he cannot be held voluntarily to have consented to the diminution of his seniority.[22]

It is unlikely that indefinite survival of these rights, together with the foregoing mechanisms of change, will cause a burdensome amount of litigation in the federal courts. Reduction in veteran's seniority or insurance rights, at least, will be comparatively rare, and amicable adjustments will probably resolve the majority of differences. In any event, as in the Fair Labor Standards Act (cf. *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 523; *10 East 40th Street Building, Inc.* v. *Callus*, 325 U. S. 578, 579–580), Congress has squarely entrusted the courts with the protection of veterans' rights, regardless of the probability of litigation, and the prospect of many lawsuits should not impel the Court to narrow the rights embodied in the statute. Perhaps administrative determination of these issues would

[22] This is, of course, even more clearly apparent in the case of those veterans, former employees of Highland, who were not released from the service until November and December 1945.

have been better (cf. Note, *Veterans' Reemployment Litigation: Need for An Administrative Process* (1946) 59 Harv. L. Rev. 593) but Congress knowingly chose otherwise. As initially passed by the Senate (in the National Guard bill, *infra*, p. 53), the reemployment provisions made the failure of the employer to comply, "an unfair labor practice within the meaning of and for all the purposes of the National Labor Relations Act", and gave the district courts jurisdiction only in cases "in which no remedy is available under the National Labor Relations Act." S. Rep. No. 1987, 76th Cong., 3rd sess., p. 2; 86 Cong. Rec. 10068. The House of Representatives, however, struck out the reference to the Labor Relations Act and vested all jurisdiction in the district courts (H. Rep. No. 2847, 76th Cong., 3rd sess.; 86 Cong. Rec. 10344, 10439, 10448) and this amendment was accepted by the conference committee and embodied in the final acts. It is noteworthy that no change in the veteran's substantive rights was thought to be made necessary by the shift from administrative to judicial determination. The issues which the Senate originally thought proper for investigation and resolution by an administrative agency were the same as those which the whole Congress later referred to the courts.

E. NOTHING IN THE NATIONAL LABOR RELATIONS ACT AUTHORIZES COLLECTIVE BARGAINING AGREEMENTS WHICH PURPORT TO RESTRICT THE BENEFITS CONFERRED ON VETERANS BY THE SELECTIVE TRAINING AND SERVICE ACT

Petitioners' second specification of error[23] apparently invokes the National Labor Relations Act as a reason for denying veterans protection after their initial year. But petitioners do not deny that the Selective Training and Service Act does in some measure restrict, in favor of veterans, the scope of bargaining agreements otherwise authorized by the Labor Relations Act. Their statement of the specification itself admits that collective bargaining cannot interfere with the veteran's statutory rights *during the first year of reemployment*. In the *Fishgold* case, this Court pointed out that "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act" (Slip opinion, p. 7). In cases under Section 8, the issue is whether the statute grants the protection asserted by the veteran; if it does, the right clearly cannot be taken away by an otherwise valid union contract. This does not mean that Section 8 amends or *pro tanto* repeals the Labor Relations Act, or circumscribes the powers it secures to the bargain-

[23] The second specification of error is as follows:

"The Circuit Court of Appeals erred: * * * 2. In holding that appellants did not have the right to bargain collectively under the National Labor Relations Act after the completion of one year's reemployment and thereby change his (and all other similarly situated) seniority status."

ing representative. That Act was intended to guarantee freedom of collective bargaining from employer coercion; it did not intend, in granting broad collective bargaining powers to the employees' representative, to validate agreements the substance of which would contravene other federal statutes dealing with specific industrial problems. The Labor Act, for example, does not free the union and the employer from the reach of the Anti-Trust Acts, where they otherwise apply (cf. *Allen Bradley Co.* v. *Union*, 325 U. S. 797), nor from the provisions of the Criminal Code relating to mutiny (*Southern S. S. Co.* v. *Labor Board*, 316 U. S. 31), nor does it permit contracts in contravention of the Fair Labor Standards Act (*Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 602; *Jewell Ridge Corp.* v. *Local*, 325 U. S. 161, 167). Similarly, nothing in the Labor Act authorizes union agreements contravening Section 8 of the Selective Training and Service Act, and there is therefore no conflict between the two statutes.

Moreover, the Selective Training and Service Act plainly declares a congressional reemployment policy, applicable alike to all veterans, regardless of the existence of a collective bargaining relationship or other private arrangement between a union and their employer. There is nowhere to be found in the Act any indication that veterans' rights are to be differently protected,

depending upon whether or not they are covered by collective bargaining agreements. If petitioner may bargain collectively concerning Whirls' seniority, regardless of Section 8, then an employer's self-imposed personnel practices may likewise reduce a veteran's seniority. Thus, the existence of the Labor Act gives petitioners no special dispensation from the statute, nor is that Act a valid reason for narrowly construing the veteran's rights under Section 8. Just as the Selective Training and Service Act cannot be construed to permit the employer to exact by threat of discharge the veteran's "agreement" to a change in his conditions of employment (see pp. 40–43, *supra*), so a veteran who joins a union solely to prevent his own dismissal under the terms of a closed-shop contract cannot be held voluntarily to have consented to the union agreement under which his seniority rights were reduced.

II. THE LEGISLATIVE HISTORY OF SECTION 8 OF THE SELECTIVE TRAINING AND SERVICE ACT SHOWS THAT CONGRESS INTENDED THE VETERAN'S RESTORED SENIORITY STATUS TO CONTINUE BEYOND THE FIRST YEAR OF REEMPLOYMENT

The legislative history of Section 8 of the Selective Training and Service Act discloses a strong and consistent congressional intention supporting our construction of the Act. Paragraph (b) (B), directing the employer to restore the veteran to his former position or to one of like

seniority, status, and pay, and the first part of paragraph (c), stating that the restored veteran is to be considered as having been on furlough or leave while in military service, etc., were treated as separate and distinct from the last clause of the latter paragraph—prohibiting discharge without cause within the first year—and were very clearly intended to have a value of their own. Rights of equality of position without loss of seniority of position were viewed as having substantial importance to the veteran, and the one-year limitation was never mentioned in connection with those rights.

In tracing the development of Section 8 of the Selective Training and Service Act, the legislative history of both that Act and the National Guard Act is pertinent, since both were simultaneously under consideration, and because a deliberate attempt was made to keep their reemployment provisions identical. Changes made in one were incorporated into the other without further debate.

As originally introduced in the 3d Session of the 76th Congress, neither S. J. Res. 286, which eventually became the National Guard Act, nor S. 4164 and H. R. 10132, which became the Selective Training and Service Act of 1940, contained any provisions concerning reemployment. Such provisions were first inserted by the Senate Committee on Military Affairs in its considera-

tion of S. 4164, the first of the two measures to be proposed; and it is in the successive Committee prints of S. 4164 that we find the development of what is now Section 8 from a pious hope into a command backed up by effective sanctions.

The first draft of the Senate Military Affairs Committee declared it to be "the purpose and intent of the Congress that every man who is called from a job when inducted * * * ought to be reemployed in such job or an equally good one without loss of seniority * * *." Committee Print No. 1, July 23, 1940. In the fourth committee draft the reemployment provisions of the Act had been broadened to include a statement that it was "the purpose and intent of the Congress that every man who is called from a job * * * with a private employer * * * be reemployed in such job or a comparable one without loss of seniority or benefits or insurance participation and benefits * * *." Committee Print No. 4, July 27, 1940. The fifth committee draft ordered private employers to restore the returning veteran to his former position "or to a position of like status and pay" (Section 8 (b)). The veteran's rights upon restoration were made the subject of a separate section (Section 8 (c)) which provided that he "shall be so restored without loss of seniority, insurance participation or benefits, or other benefits, and such person shall not be discharged from such position without

cause within one year after such restoration." Committee Print No. 5, July 31, 1940.

While these reemployment provisions were developed during Senate Military Affairs Committee consideration of S. 4164, they were first debated in Congress in connection with S. J. Res. 286 which, although introduced much later than S. 4164, was reported earlier. S. J. Res. 286, introduced on July 30, 1940 (86 Cong. Rec. 9684), was reported the same day with the addition of the reemployment provisions developed by the Committee in connection with S. 4164. See S. Rep. No. 1987, 76th Cong., 3d sess. These provisions contained a paragraph similar to Section 8 (b) (B) of the present Act (but with reference only to "a position of like status and pay"), and paragraph (c) identical with the paragraph (c) originally enacted in the National Guard Act.[24] The Senate passed the National Guard bill without any change in the Committee-recommended reinstatement provisions. '86 Cong. Rec. 10068. The House Committee on Military Affairs, however, recommended the elimination of paragraph (c), including the

[24] Section 3 (c) of the National Guard Act originally read as follows (54 Stat. 858, 860):

"Any person who is restored to a position in accordance with the provisions of paragraphs (A) or (B) of subsection (b) shall be so restored without loss of seniority, insurance participation or benefits, or other benefits, and such person shall not be discharged from such position without cause within one year after such restoration."

"one-year" provision (H. Rep. No. 2847, 76th Cong., 3d sess.), but inserted the term "seniority" in paragraph (b) (B); and the House accepted both amendments without debate. 86 Cong. Rec. 10439, 10448. In conference, paragraph (c) was restored and the House's insertion of "seniority" in paragraph (b) was adopted in order to ensure the preservation of the seniority of returning servicemen as well as their status and pay (H. Rep. No. 2874, 76th Cong., 3d sess.). The Chairman of the House Military Affairs Committee explained the addition of the references to seniority (86 Cong. Rec. 10761):

> * * * You will find that in amendments number 12, 13, and 14 the House inserted the word "seniority" relating to a position held by the guardsman. It is inserted in three places, and provides that he shall be restored to his seniority status. In other words, if a man is a Civil Service employee in the Government of the United States and is called into service, he shall be restored on his return to the senior position he held before he left without losing that seniority position. Likewise, with a railroad employee, under a system of seniority rights on the railroad that gives the older men in the service priority over the others, that man when he returns shall be restored to his seniority position.

S. J. Res. 286 was passed by both Houses with these changes. 86 Cong. Rec. 10759–10763, 10791; National Guard Act, Joint Resolution of August 27, 1940, c. 689, 54 Stat. 858.

These reemployment provisions were then carried over, without further consideration, into the selective service bill (86 Cong. Rec. 10922–10923) with a further amendment elaborating paragraph (c) to its present form. 86 Cong. Rec. 10914, 11702. It was changed to read as follows, the italicized portions indicating the added and amended language:

> "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *shall be considered during the period of service in such forces as on furlough or leave of absence; and* shall be so restored without loss of seniority; *and shall be entitled to participate* in insurance or other benefits *offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time of being inducted into such forces,* and shall not be discharged from such position without cause within 1 year after such restoration.[25]

[25] This change was then made in the appropriate section of the National Guard Act, previously passed, so as to conform the two statutes. See Section 8 (d) of the original Selective Training and Service Act, 54 Stat. at 891, amending Section

The chief purpose of this amendment, according to Chairman May, was (86 Cong. Rec. 11702)—

> to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service and they will even be permitted to count this time on the question of their retirement.

Throughout the Congressional consideration of the reemployment provisions, both in the National Guard and the selective service bills, the independent substantiality of the right of restoration to a job without loss of seniority was never questioned nor was its limitation to one year ever suggested. The amendments further protecting seniority and insurance rights, quoted above, provide one revealing instance of this uniform attitude. General Senate and House debate evidenced the same intention. Senator Sheppard, Chairman of the Senate Military Affairs Committee, described Section 8 as an at-

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3 (c) of the National Guard Act. The only difference then remaining reflected the different character of the military service involved. Section 8 (c) of the Selective Training and Service Act referred to "the time such person was inducted into such forces," while Section 3 (c) of the National Guard Act as amended spoke of "the time such person was ordered into such service."

tempt "to prevent loss of seniority, accrued employment benefits * * * and other beneficial programs," (86 Cong. Rec. 10095) and the identical provision in the National Guard Act as an effort to insure that returning veterans be restored "to their former employment at the end of their training or to employment of similar pay and status." He further explained that "Persons restored to * * * positions in private employment shall be so restored without loss of seniority, insurance participation, or other benefits, and such persons shall not be discharged from such positions without cause within 1 year after such restoration." (86 Cong. Rec. 9836). Senator Thomas, another member of the Senate Military Affairs Committee, referred to Section 8 as an attempt "* * * to make secure [the veterans'] seniority, and to make secure all of the relations they had gained as a result of working." (86 Cong. Rec. 10572). Representative Celler considered Section 8 as a direction to private employers to restore the returning veteran "to [his original] position or to a position of like seniority, status, and pay * * *", and that under these provisions, "All those who serve shall have the right to claim return to their jobs". 86 Cong. Rec. 11435. Representative Healey stated that "You have held out to these men you are going to induct into service that you will restore

them insofar as you have the power to restore them to their status quo before they were inducted into the service" (86 Cong. Rec. 11703) and Representative Jennings put it that the bill "admonishes employers, whose employees are drafted into the service under the act, to take such employees back and put them in their jobs * * *." 86 Cong. Rec. 12221. Other Congressmen described the reemployment provisions as directing the employer to "rehire" (86 Cong. Rec. 10107); as a provision to "conscript" the servicemen's "jobs" (86 Cong. Rec. 10487); and as securing "reemployment" (86 Cong. Rec. 11697). This note of the independence, substantiality, and stability of the right to restoration is consistently struck in the course of debate.

Perhaps the most significant detail, for the present case, in the history of these provisions is the elimination of paragraph (*c*) by the House in its consideration of the National Guard bill. See pp. 53–54, *supra*. Neither the House Committee on Military Affairs nor the House gave an explanation of this change, but at the very least it is plain that the House considered paragraph (b) (buttressed by an explicit reference to seniority) as separate and distinct from the discharge clause of paragraph (*c*), and independently effective to protect the veteran. Nor can it be that this independent effectiveness was thought to be limited to the initial moment of reinstatement,

and that thereafter the veteran was entirely on his own. To the House, paragraph (b) constituted all of the veteran's reemployment rights, and it is difficult to suppose that that body, which was intent on opening the Federal courts to all veterans seeking restoration and on giving them Federal counsel without expense (86 Cong. Rec. 10344, 10439, 10443–10444), intended to grant veterans a wholly illusory "right" which would expire as soon as it was born. On the contrary, the tenable explanation appears to be that the House viewed the guarantees of paragraph (b) as substantial and also legally effective for an indefinite period of time. The addition of paragraph (c) could not have been designed to excise from paragraph (b) its previously intended effectiveness, but only to make explicit the full scope of certain protected rights and to add new ones.

In connection with the survival of seniority rights, the recent amendment of the Act continuing Section 8 indefinitely (see note 13, *supra*, p. 28) has significance. The amendment was intended to make the section "permanent law" (Statement of Managers on the part of the House of Representatives, 92 Cong. Rec. 7479 (daily ed.)) and "perpetual" (statement of Chairman May, 92 Cong. Rec. 3659 (daily ed.)). Chairman May stated: "Section 8 of the act is the one that guarantees a man priority or seniority rights to a job, or to his old job when he returns from the

service and we have maintained that provision and made it perpetual so long as the act is in effect." At the same time, Section 8, together with other provisions of the Act, was specifically reenacted. It is unlikely that Congress would have thought it necessary to enact Section 8 into permanent law, if all veteran's reemployment rights would expire within a year after initial reinstatment. An extension of time for a relatively short period—the expiration date of the Act, plus the required length of service of the last inductee thereunder, plus the ninety-day option period, plus the first year of reemployment; i. e., 42 months in all—would have afforded ample protection of the kind petitioners here concede to the veteran. The circumstance that Congress chose instead to make the right perpetual appears to us additional proof that our construction of the seniority privilege is the correct one.

III. PETITIONERS' INDIVIDUAL DEFENSES TO WHIRLS' CLAIM FOR PROTECTION OF HIS RESTORED SENIORITY STATUS ARE INVALID.

Petitioners suggest certain considerations, special to this case, which they appear to believe should bar Whirls from receiving judgment, although their briefs do not formulate these considerations into actual defenses.

A. No substantial claim is made that it would be either unreasonable or impossible to reinstate

respondent in his status of seniority as of 1935.[26] Without invoking that defense, the company states that because of the opposition of Trailmobile's old employees, "chaotic labor conditions will result if the court below is affirmed", and an oblique threat to discharge Whirls is made, both by Trailmobile (Br. 19–20) and by Local 392 (Br. 13). But intense opposition by the employees to respondent's enjoyment of his statutory rights cannot be used to divest him of those privileges, any more than determined opposition of townspeople has been permitted to turn the exercise of the right of free speech into a nuisance to be enjoined (*Hague* v. *C. I. O.*, 307 U. S. 496, 516), or than public passion and the pressure of a mob have been allowed to deny to unpopular individuals the essential features of a fair trial (*Moore* v. *Dempsey*, 261 U. S. 86).

The rights granted by Section 8 of the Selective Training and Service Act are not to be evaded because of group hostility. As to the implied threat of discharge, it is enough to say that we do not believe that, in the event of affirmance, Trailmobile will be able to dismiss Whirls for the reason, directly or indirectly, that he insists on his rights under the Act. See pp. 40–43, *supra*.

[26] This issue was not presented to the lower courts nor is it presented on the petition for certiorari, or included in the assignment of errors. The lower courts made no findings on the point.

Nor do we believe that Local 392 will be free to negotiate for his discharge for a like reason.

B. Petitioners also suggest that, because of the merger, maintenance of respondent's 1935 seniority status would discriminate against (a) those Trailmobile veterans with seniority post-dating that of Whirls, and (b) other former Highland employees who are not veterans and are bound by the decision of the Ohio courts in the *Hess* litigation. The situation of the latter group is no different from that of any other body of non-veterans faced with a legally permissible change in their conditions of employment; they can hardly complain that Section 8 works, as it was intended, to accord a veteran special protection from such alterations in his status, nor can they use the resultant "discrimination" to defeat the veteran's rights. As for the Trailmobile veterans with inferior seniority, it is true that Whirls' reinstatement makes it impossible for them to receive exactly the same seniority status as they previously had, but, in all probability, Whirls' position on the consolidated seniority roster is likewise somewhat changed because of the merger. It is that which has made it impossible to restore each veteran to his exact place on the seniority lists, but there is no reason to believe that the minor readjustments in standings necessitated by the consolidation are substantial enough to derogate from either Whirls' or the Trailmobile vet-

erans' rights. Section 8 (b) (B) entitles them only to a position of "like" seniority—not a position of precisely the same seniority but of substantially the same.

C. We have already pointed out that respondent's enforced joining of petitioner union in June 1945 in order to save his job (R. 65) cannot be deemed binding adhesion to the terms of the new union agreement reducing his seniority, nor consent to such a change in his protected status. See *supra*, pp. 45–46. Petitioners faintly suggest, but do not press, this point.

D. We have likewise pointed out, pp. 11–12, *supra*, that, after the decision below in Whirls' favor and while the petition for certiorari was pending, Local 392 informed Whirls, by letter dated April 10, 1946, that he was charged with "conduct unbecoming a member of the Union." The specifications of this charge included the institution of the present action in Civil Court without exhausting your remedies provided by the Union," violation of the Union contract, negotiating for himself through others than the Union, and a catch-all specification of conduct contrary and harmful to the interests of the Union and its members.

The crux of the matter appears to be the institution and successful prosecution of the instant action authorized by Section 8 (e) of the Selective Training and Service Act. We do not believe

that Local 392 can validly expel or suspend respondent (and thus cause his dismissal by Trailmobile) simply because he chose to exercise his statutory right to sue to force his employer to comply with Section 8 (b) (B) and 8 (c).

In the first place, it is not clear that the constitution of Local 392 expressly prohibits members from resorting to the courts in these circumstances; and courts are wary of reading this prohibition into general provisions disciplining conduct unbecoming a member or requiring amicable adjustment of controversies. "An intention to deny all access to the courts of the land will not be presumed. If it be enforceable at all, it must be unmistakably expressed." *Burke* v. *Monumental Division,* 273 Fed. 707 (D. Md.); cf. *Polin* v. *Kaplan,* 257 N. Y. 277. But, in any case, an express union rule forbidding consultation with an attorney or the institution of suit to vindicate legal rights would be invalid. *Lo Bianco* v. *Cushing,* 115 N. J. Eq. 558 (Ct. Err. & App.); *Collins* v. *International Alliance,* 119 N. J. Eq. 230, 248 (Ct. Ch.). This result follows from the paramount public policy which jealously guards the exercise of all rights of access to court and legislature against union attempts to restrict a member's civil rights, especially where expulsion from the union is tantamount to loss of employment. Rules have been held invalid which provide for the expulsion of

members testifying in court to the injury of other members (*Thompson* v. *Grand International Brotherhood,* 41 Tex. Civ. App. 176), for voting as a member of a public board for a candidate for a city position other than one recommended by the union (*Schneider* v. *Local Union No. 60,* 116 La. 270), for refusing to pay a union insurance assessment previously held illegal by a court (*Sweetman* v. *Barrows,* 263 Mass. 349), for urging the state legislature to defeat a bill sponsored by the union's legislative representative (*Spayd* v. *Ringing Rock Lodge,* 270 Pa. 67), or for voting for another union in a federally conducted collective bargaining election (*Ray* v. *Brotherhood of Railroad Trainmen,* 182 Wash. 59).

Here, Congress has expressly opened the federal courts to employees believing themselves deprived of reemployment rights under the Selective Training and Service Act and has provided for representation of the veteran by the United States Attorney, if that official is "reasonably satisfied that the person so applying is entitled to such benefits." The United States Attorney for the Southern District of Ohio was satisfied that respondent was entitled to his rights under Section 8, and undertook to represent him; the District Court and the Circuit Court of Appeals have upheld respondent's claim. In the face of the specific provisions of Section 8 (e)

and the reasonableness of Whirls' suit, it cannot be consonant with sound public policy to penalize him for the institution of this action. The union's letter of April 10, 1946, makes some point of Whirls' alleged failure to exhaust union remedies, but it is clear, even from this record, that respondent and his fellow Highland employees tried for over a year to remedy their plight and that further recourse to the union would be wholly useless. A union member cannot be required to resort further to union tribunals where such action would clearly be in vain or the charge against him is invalidated by public policy. *Cameron* v. *International Alliance,* 118 N. J. Eq., 11, 20 (Ct. Err. & App.); *Ray* v. *Brotherhood of Railroad Trainmen,* 182 Wash. 39. Furthermore, grave doubts as to the union's good faith in seeking to punish respondent are raised by the facts that disciplinary action was not taken against him during the unsuccessful *Hess* litigation (commenced July 17, 1944) in which he was named as one of those on behalf of whom the suit was brought, nor at the time he instituted the present case in September 1945, but only after he had succeeded in the District Court and the Circuit Court of Appeals, and the petition for a writ of certiorari was about to be filed in this Court.

It is difficult to escape the conclusion that Local 392 is simply seking to destroy Whirls' judicially

validated rights through the control which its closed shop contract gives to it over Trailmobile's employment policy. And Local 392 concedes as much (Br. 13), when it says that the effect of the decision below is to place the union in a position where it must "negotiate for the discharge of Highland veterans at the end of one year's guaranteed employment." Whirls would then, of course, lose his livelihood, a contingency for which Local 392 holds the judiciary to blame (Br. 13): "By this strained construction placed on the Act of Congress, the Courts are turning a veteran's benefit into an absolute detriment."

We should not like our failure to explore the nature and causes of petitioners' differentiation in treatment, in the collective bargaining agreements of 1944 and 1945, of the former Highland employees, to be construed as an admission either (a) that the treatment of Whirls and his fellow employees did not constitute unfair discrimination under *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginmen*, 323 U. S. 210; and *Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248; cf. *Hunt* v. *Crumboch*, 325 U. S. 821, 826, or (b) that such unfair discrimination cannot be redressed under Section 8 of the Selective Training and Service Act after the lapse of the initial year of reemployment, whether or

not enforced non-discriminatory changes are barred by the Act.

These points were not raised on respondent's behalf in the lower courts, and no evidence was introduced by any party on the issue of unfair discrimination. Cf. *Hormel* v. *Helvering*, 312 U. S. 552, 556. In view of that fact, and of the *Hess* litigation, we believe that it would be inappropriate, at this stage, to argue these issues.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below is correct and should be affirmed.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
OSCAR H. DAVIS,
EMERY COX, JR.,
CECELIA H. GOETZ,
Attorneys.

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APPENDIX

The Selective Training and Service Act of 1940 as originally enacted September 16, 1940, c. 720, 54 Stat. 885, 50 U. S. C. App. 301 *et seq.*, provided in part as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) the Congress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States.
>
> (b) The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service.
>
> * * * * * *
>
> SEC. 8. (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes ap-

plication for reemployment within forty days after he is relieved from such training and service—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have

power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against the person so applying for such benefits.

* * * * * *

(g) The Director of Selective Service herein provided for shall establish a Personnel Division with adequate facilities to render aid in the replacement in their former positions of, or in securing positions for, members of the reserve components of the land and naval forces of the United States who have satisfactorily completed any period of active duty, and persons who have satisfactorily completed

any period of their training and service under this Act.

* * * * *

SEC. 16. (a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force.

(b) All the provisions of this Act, except the provisions of sections * * * 8 (g) * * * shall become inoperative and cease to apply on and after May 15, 1945 * * *.

By Act of December 8, 1944, c. 548, 58 Stat. 798, 50 U. S. C. App. Supp. V, 308, Section 8 (b) of the Selective Training and Service Act of 1940 was amended to read as follows:

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to

a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *

By Act of May 9, 1945, c. 112, 59 Stat. 166, Section 16 (b) of the Selective Training and Service Act of 1940 was amended to read as follows:

(b) All the provisions of this Act, except the provisions of sections * * * 8 (g) * * * shall become inoperative and cease to apply on and after May 15, 1946, or the date of the termination of hostilities in the present war, or on such earlier date as may be specified in a concurrent resolution of the two Houses of Congress for that purpose, * * * As used in this section the term "date of the termination of hostilities in the present war" means the date proclaimed by the President as the date of such termination or the date specified in a concurrent resolution of the two Houses of Congress as the date of such termination, whichever is the earlier.

The Act of June 29, 1946, Public Law 473, 79th Cong., 2d sess., c. 522, provided in part as follows:

SEC. 1. * * * all of the provisions of the Selective Training and Service Act of 1940, as amended, are hereby expressly reenacted, except those provisions which are hereinafter amended or repealed.

* * * * *

SEC. 7. Section 16 (b) of such Act, as amended, is amended to read as follows:

"(b) The provisions of the third sentence of section 3 (a) of this Act shall become inoperative and cease to apply at 12

o'clock post-meridian on July 1, 1947. All of the other provisions of this Act, except the provisions of sections 3 (b), 3 (c), 3 (d), 8, and 16 (b), and the fourth and fifth provisos of the second sentence of section 3 (a), shall become inoperative and cease to apply at 12 o'clock post-meridian on March 31, 1947, or on such earlier date as may be specified in a concurrent resolution of the two Houses of Congress for that purpose, except as to offenses committed prior to such date. One day prior to the date of the termination of the Selective Training and Service Act of 1940, as amended, as herein or hereafter specified, all remaining functions and responsibilities of the Personnel Division established under the authority of section 8 (g) of such Act, and all records and balances of appropriations which have been utilized or are available for use in the administration of such functions of the Personnel Division of the Selective Service System, shall be transferred to such agency of the Federal Government as the Congress may designate, or, if none is so designated, to such agency of the Federal Government as the President may designate."

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